No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS BRIEF OF THE STATES OF UTAH, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Auer v. Robbins, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The questions presented are:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

2. Alternatively, whether *Auer* deference should yield to a substantive canon of construction.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the States of Utah, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming. As sovereigns, *amici* have a pronounced interest in cases that implicate the constitutional tenets of federalism and the separation of powers.

This case fits that bill. The interpretive rule from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), reiterated in *Auer v. Robbins*, 519 U.S. 452 (1997), uniquely harms the States. That rule requires courts to give controlling weight to a federal agency's *ad hoc* views of an ambiguous regulation—even when those views will preempt contrary State law, or retroactively change the conditions of Spending Clause legislation. *Seminole Rock* deference thus alters the balance of federal-state power and raises serious constitutional questions.

Amici urge this Court to grant certiorari and assess *Seminole Rock*'s continuing validity. Careful scrutiny will confirm that, for *Seminole Rock*'s rule, "[e]nough is enough." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

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[1] Counsel of record for all parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

To allay fears about the proposed Constitution, Alexander Hamilton assured the people of New York that "[i]t will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities." The Federalist No. 17, at 106 (J. Cooke ed. 1961). *Seminole Rock* and *Auer* have made Hamilton a liar.

Those two cases, which *amici* refer to synonymously, give federal agencies a judicially created power to bind the States to *ad hoc* interpretations of their agency's own ambiguous regulations. "The canonical formulation of *Auer* deference is that [this Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414).

Lately, however, the more canonical statements about *Seminole Rock* have been criticisms of it. Rightly so. Time and experience have laid bare *Seminole Rock*'s faults. *Seminole Rock* allows agencies to bind the public to informal rules adopted without following the Administrative Procedure Act's (APA) strictures. That is bad for the public; they become governed by agency caprice, with no prior notice of an agency's views (or a chance to help shape them). In contrast, it's hard to think of a better deal for regulators, who can accomplish their goals free from the hassle of complying with the APA.

Fixing those problems is reason enough to grant certiorari and reverse the decision below. But there is more. *Seminole Rock* deference creates unique problems for States that also justify plenary review. *Seminole Rock* upsets the Constitution's finely wrought balance of federal-state power: By giving controlling weight to informal agency action that conflicts with contrary State law, *Seminole Rock* effectively expands the Federal government's power under the Supremacy Clause, deprives States of constitutional safeguards from Federal overreach, and undermines the States' APA protections. *Seminole Rock* also allows agencies to retroactively change the terms of federal-state agreements in Spending Clause legislation. That threatens the States with the loss of vast sums—even hundreds of millions of dollars—just because of one federal bureaucrat's change of mind.

Those problems call not only for revisiting *Seminole Rock* deference but also for overruling it. No *stare decisis* considerations support retaining it. And this case is an excellent vehicle for doing so—the issue is squarely and properly presented. The Court should grant certiorari and reverse the judgment below.

ARGUMENT

I. Whether *Seminole Rock* Deference Remains Valid Is Critically Important To The States.

A special mischief arises when an agency authoritatively interprets its own ambiguous regulations. That mischief affects the public writ large but harms the States uniquely because they are sovereigns subject to federal bureaucratic edicts. *Seminole Rock*'s impact on the States justifies plenary review.

A. *Seminole Rock*'s Faults Are Well Known.

Seminole Rock's flaws are not secrets. First, *Seminole Rock* deference gives an agency's informal, *ad hoc* interpretation of its regulations the same force of law as rules the agency promulgates through formal notice-and-comment rulemaking. This creates a problematic but obvious incentive for agencies: take the shortcut. Adopt vague formal rules, then return to them later—when you're not hamstrung by the APA's formalities—to get the result you really want. Second, those shortcuts by definition deprive the public of "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Third, *Seminole Rock* makes agencies *sui generis* among the federal branches: They become both lawmaker and judge, wielding power to adopt (ambiguous) regulations *and* to effectively have the last word on what those (ambiguous) regulations mean. The petition ably explains those faults. *See* Pet. 10-18.

Members of this Court have previously identified these problems.[2] So have other federal judges[3] and academics.[4]

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[2] *See, e.g.*, *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment); *Decker*, 568 U.S. at 616-26 (Scalia, J., concurring in part and dissenting in part); *Talk Am., Inc. v. Mich. Bell Tele. Co.*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring).

[3] *See, e.g.*, *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The problems [*Auer* and *Seminole Rock*] create are serious and ought to be fixed."); *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841-42 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc) (explaining the consequence of applying *Auer* deference in that case: the party's "conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal"); *Johnson v. McDonald*, 762 F.3d 1362, 1368 (Fed. Cir. 2014) (O'Malley, J., concurring) ("the validity of *Auer* deference is questionable"); *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 494 (5th Cir. 2013) ("Affording deference to agency interpretations of ever more ambiguous regulations would allow the agency to function not only as judge, jury, and executioner but to do so while crafting new rules."); *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 576 n.5 (7th Cir. 2012) (explaining that *Auer* "raises serious separation-of-powers and administrative law concerns").

[4] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996); *see also, e.g.*, Philip Hamburger, *Is Administrative Law Unlawful?* 317 & n.25 (2014) (arguing that a court's deferring

Amici also agree with those critiques but will not belabor them. Instead, *amici* highlight *Seminole Rock*'s uniquely problematic impacts on States—entities that "possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause," *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), but that remain subject to federal regulatory *diktats*.

B. Whether *Seminole Rock* Deference Remains Valid Warrants Review Because Of The Special Problems It Creates For States.

Seminole Rock deference imposes at least four hardships distinctively on States. First, it expands the Federal government's power to preempt State law. Second, it undermines the States' political protections built into the Constitution. Third, it undercuts the States' APA protections, which decreases the States' political checks on federal lawmaking and upsets the balance of federal-state power. Fourth, it allows agencies to retroactively change conditions governing the States' receipt of federal funds from Spending Clause legislation—something not even Congress can do.

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to an agency's interpretation of its own regulations amounts to an "abandonment of judicial office," particularly since "the Court would not defer to an act of Congress interpreting a prior act" of Congress); Jennifer Nou, *Regulatory Textualism*, 65 Duke L.J. 81, 90-91 (2015) (explaining the "sense" of various academics and Supreme Court Justices "that an unreflective rule of deference has facilitated tenuous agency interpretations at the expense of fair notice and process").

1. State laws that conflict with valid federal laws are unenforceable. U.S. Const. art. VI, § 2. States thus have an interest in ensuring that federal law arises from constitutionally prescribed procedures. *Seminole Rock* deference impairs the States' ability to vindicate that interest.

Federal legislation becomes law after both houses of Congress approve it and the President signs it (or Congress overrides a veto). U.S. Const. art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). The bicameralism and presentment requirements reflect the Framers' decision that Federal legislative power should "be exercised in accord with a single, finely wrought and exhaustively considered procedure." *Id.* at 419. That sole procedure is the only legislative mechanism that the ratifying States agreed would produce "the supreme law of the land," U.S. Const. art. VI, § 2, capable of displacing conflicting state law.

Even so, this Court has held that state laws may be preempted not only by duly enacted federal statutes, but also by "a federal agency acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *see also, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Whatever that holding's vitality where Congress has expressly (or implicitly) "delegated to the agency the authority to interpret [statutory] ambiguities 'with the force of law,'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001)), that theory cannot justify a federal *agency's* interpretation of its own ambiguous regulation displacing state law. For

even if Congress implicitly authorizes an agency to resolve any ambiguities in a statute it implements, *see, e.g.*, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), "there is surely no congressional implication that the agency can resolve ambiguities in its own regulations," *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting). Yet that is where *Seminole Rock* inevitably leads.

And courts have in fact followed that path. They have held state law to be displaced when it purportedly conflicts with an agency's interpretation of its own ambiguous regulations. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 612-25 (2011); *Grier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000); *Chae v. SLM Corp.*, 593 F.3d 936, 948-50 (9th Cir. 2010); *Wells Fargo Bank of Tex. N.A. v. James*, 321 F.3d 488, 494-95 (5th Cir. 2003); *State Farm Bank, F.S.B. v. Burke*, 445 F. Supp. 2d 207, 221 (D. Conn. 2006). State law thus gets trumped by a form of federal law at least two steps removed from any law "made in pursuance" of the Constitution's text. U.S. Const. art. I, § 7, cl. 2.

That troublesome conclusion is even more puzzling given *Seminole Rock*'s incongruity with this Court's precedent about the preemptive reach of Executive action. The President cannot arrogate to himself the power to preempt state law. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008) (holding that the President cannot preempt state law absent constitutional or statutory authorization). It must follow that the President's administrative functionaries also cannot arrogate to themselves the power to preempt state law absent constitutional or statutory authorization. After all, "[e]xecutive agencies derive their authority from

Article II of the Constitution, which vests '[t]he executive power' in 'a President of the United States.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (quoting U.S. Const. art. II, § 1, cl. 1). Yet *Seminole Rock* requires courts to defer to agency action that inherently lacks statutory authorization—*even when* it preempts state law. The upshot? What *Medellin* prohibits of the principal, *Seminole Rock* expressly authorizes by his agents.

In short, *Seminole Rock* deference undermines the bargain the States struck when they ratified the Supremacy Clause. This Court should grant certiorari to consider whether that deference remains appropriate.

2. *Seminole Rock* deference also undermines the Constitution's political protections for States. "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). Indeed, the very "composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* at 550-51.

For example, Article I, section 7's bicameralism requirement ensures that legislation must win the approval of the Senate, "where each State received equal representation and each Senator was selected by the legislature of his State." *Garcia*, 469 U.S. at 551. More generally, the Framers believed that legislators' attachment to their individual States would make them "disinclined to invade the rights of the individual States, or the prerogatives of their governments." The

Federalist No. 46, at 319 (Madison) (J. Cooke ed., 1961).

Even though Senators are now elected by popular vote rather than by state legislature, U.S. Const. amend. XVII, States still retain their equal representation in the Senate. And because both Senators and Representatives are elected from specific States, they have real incentives to be responsive to their constituents' varying state-specific needs and interests. *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 547 (1954) ("To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.").

But the States lack an analogous direct constitutional role in the composition of federal agencies. To be sure, Senators exercise advice-and-consent authority when voting on the President's nominees to agency positions. U.S. Const. art. II, § 2, cl. 2. But no officials dependent on a State's political support thereafter participate in an agency's workaday activities in any way analogous to a Representative's or Senator's involvement in the House's or Senate's daily business. Agencies thus lack the same institutional incentives to respect State interests when promulgating regulations that motivate members of Congress when they enact statutes. *See Grier*, 529 U.S. at 908 (Stevens, J., dissenting) ("Unlike Congress, administrative agencies are not designed to represent the interests of States.").

Seminole Rock deference further depresses the limited agency incentives to promulgate clear rules when resolving statutory ambiguities. Under *Seminole Rock*, an agency's later, *ad hoc* views of vague regulations have the same preemptive force as formal rules. The resulting incentives favoring *informal* agency action—and the concomitant attenuation between those informal acts and statutory authority—reduce the States' chances of meaningfully influencing federal regulatory policies that directly affect their interests. *See* Manning, *Constitutional Structure*, 96 Colum. L. Rev. at 654 (explaining that *Seminole Rock* "undermine[s] the effectiveness of external political checks on administrative agencies").

This Court should grant review and determine whether *Seminole Rock* deference remains justified in light of its effect on the Constitution's political safeguards for States.

3. *Seminole Rock* also limits the States' ability to invoke statutory procedural safeguards. The APA requires agencies to promulgate substantive regulations through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. When agencies comply with that requirement, States can—and do—actively participate in the notice-and-comment process to ensure that federal agencies understand their interests and views. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953, 984-95 (2014) (discussing the role of the States and state interest groups in administrative proceedings); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 777-78 (2004) (reviewing opportunities for the States to participate in the administrative process).

Unfortunately, *Seminole Rock* distorts the APA's regulatory processes. It creates an incentive for agencies to issue ambiguous regulations that they can later interpret in less formal proceedings, free from the APA's formal constraints. Agencies thus can accomplish their regulatory goals *and* avoid the accountability contemplated by the APA's notice-and-comment requirements. *See, e.g.*, Manning, *Constitutional Structure*, 96 Colum. L. Rev. at 654 (explaining that *Seminole Rock* limits "the efficacy of rulemaking as a check upon arbitrary and discriminatory agency action"). Indeed, in light of *Seminole Rock*, "[i]t is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

In short, when courts give "controlling weight" to agency interpretations of ambiguous regulations, they sanction an agency's intentional circumvention of the APA, thus "allow[ing] agencies to make binding rules unhampered by notice-and-comment procedures." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). This deprives coordinate sovereigns of their statutory rights to influence federal regulatory actions through notice-and-comment procedures. Whether *Seminole Rock* deference remains justified given those heavy costs is a question deserving of this Court's plenary review.

4. *Seminole Rock* deference is in obvious tension with this Court's Spending Clause precedents.

Under the Spending Clause, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1984). That is because spending statutes are "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed limitations." *Id.* And Congress's power to make those contracts "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'"; that is, "[t]here . . . can be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Thus Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Id.* at 25.

That need for clarity peaks when Congress conditions receiving federal funds on the States' agreement to relinquish their historic immunity from suit. In the Eleventh Amendment context, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This clear-statement rule recognizes "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst*, 465 U.S. at 99-100.

Seminole Rock's deference rule creates tension with those Spending Clause precedents in at least two ways. First, because those cases require *Congress* to speak clearly as to whether the States are bound to an obligation, there is no basis for courts to give binding deference to an *agency* when Spending Clause legislation "is susceptible of multiple plausible interpretations."

Sossamon v. Texas, 563 U.S. 277, 287 (2011). Yet *Seminole Rock* requires that course. Second, courts must defer under *Seminole Rock* no matter when the agency announces its *ad hoc* views. But the *Pennhurst* canon requires that Congress provide notice of the conditions "at t[he] time" the funds are received. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669-70 (1985). *Seminole Rock* deference may thus be the sole exception to the general rule that the federal government may not "modify past agreements with recipients by unilaterally issuing" new "guidelines" after the agreement has been consummated. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997).

Though the decision below does not arise from a dispute about Spending Clause legislation, recent executive action in that context shows why guidance on *Seminole Rock*'s continuing vitality is needed. In one instance, federal agencies changed their views about Title IX spending legislation via a letter to State education officials, threatening their contracting State partners with the loss of hundreds of millions of dollars in educational funding nationwide. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017). In another, counties challenged an executive order that they contended gave agencies the authority to deprive them of potentially billions of dollars in federal funds because they disagree with the Administration's immigration policies. *See Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 511-16 (N.D. Cal. 2017). A decision in this case could resolve the unacceptable tension between *Seminole Rock* and *Pennhurst*, with its potentially massive consequences for State coffers.

II. *Seminole Rock* Should Be Overruled.

It is time to jettison *Seminole Rock*. Experience has confirmed that *Seminole Rock*'s deference rule cannot bear its own weight. And *stare decisis* considerations do not support retaining it.

A. *Seminole Rock* Was Wrongly Decided.

Seminole Rock's deference rule consistently yields results that conflict with first principles of administrative and constitutional law.

For example, where administrative law presumes that regulations "must give fair notice of conduct that is forbidden or required," *Fox Television Stations*, 567 U.S. at 253, *Seminole Rock* deference blesses *post hoc* agency action that gives the public *no* warning—let alone "fair warning"—"of the conduct a regulation prohibits or requires," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotation marks omitted). And where the APA presumes that the public will be bound by formal rules made through notice-and-comment procedures, *see* 5 U.S.C. § 553, *Seminole Rock* deference allows an agency's informal, *ad hoc* views "not just to advise the public, but also to bind them." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). So much for the "extensive procedural safeguards" that the States secured as part of administrative law's main "working compromise." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

Seminole Rock also produces results that conflict with the Constitution. The Founders viewed the

separation of powers as the "political truth" of "greate[st] intrinsic value." The Federalist No. 47, at 324 (Madison) (J. Cooke ed. 1961). For "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." *Id.* at 326 (internal quotation marks omitted). And were the judicial power "joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." *Id.* (internal quotation marks omitted). Yet *Seminole Rock* "permit[s] the person who promulgates a law to interpret it as well." *Talk America*, 564 U.S. at 68 (Scalia, J., concurring).

Equally problematic, *Seminole Rock* deference contradicts longstanding constitutional presumptions under the Supremacy Clause and the Spending Clause. First, the Federal government's power to preempt State law "is an extraordinary power in a federal system" that this Court "assume[s] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *Seminole Rock*, however, upends that presumption when an agency is the lawmaker. An agency's *ad hoc* views of ambiguous regulations are the very embodiment of lawmaking "exercise[d] lightly"—yet *Seminole Rock* commands courts to credit them over contrary State law. Second, Congress must clearly state the terms it requires of States as a condition of receiving federal funds *before* the State agrees to them. *Pennhurst*, 451 U.S. at 17, 25. But *Seminole Rock* requires courts to defer to an *agency*'s after-the-fact views of those conditions—views the assenting States never could have known. Neither result is constitutionally sound; there is no justifiable basis for

allowing courts to grant more slack to agencies who mount *ad hoc* attacks on State law, or revise the States' contracting conditions, than they grant to Congress.

Seminole Rock also incentivizes the creation of federal lawmaking via informal agency action. If more law is made that way—rather than in Congress or by formal regulatory proceedings—the States continue to lose the benefits of the Constitution's structural protections "designed in large part to protect the States from overreaching by Congress," *Garcia*, 469 U.S. at 550-51, and of their APA right to advocate their interests in notice-and-comment proceedings.

Those myriad problems should be fatal to *Seminole Rock*'s deference rule. A hypothetical example about the canons of *ejusdem generis* and *noscitur a sociis* makes the point. If interpreting a text's ambiguous, general term in light of that text's more specific related or associated terms, *see Yates v. United States*, 135 S. Ct. 1074, 1085-87 (2015), consistently led to outcomes that flouted bedrock principles of constitutional and administrative law, not another year would pass before this Court would purge those canons from the United States Reports. The same fate is appropriate for *Seminole Rock* deference—a rule used to interpret an agency's informal views of ambiguous regulatory text.

B. *Stare Decisis* Considerations Do Not Save *Seminole Rock*.

As the petition explains, this Court may not even need to consider traditional *stare decisis* principles before jettisoning *Seminole Rock* deference because *Seminole Rock* "is merely an interpretive tool." Pet. 18 (citing *Mortgage Bankers*, 135 S. Ct. at 1214 n.1

(Thomas, J., concurring in the judgment)). In any event, assuming *stare decisis* applies, not one of its factors supports retaining *Seminole Rock* deference.

Far from being "well reasoned," *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009), *Seminole Rock*'s deference rule rests solely on "*ipse dixit*," with "no justification whatsoever," *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part). *Auer* did not fill that gap; it rotely applied *Seminole Rock*. *See* 519 U.S. at 461. Nor have this Court's cases since *Seminole Rock* "put forward a persuasive justification for *Auer* deference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

Compounding that problem, the intervening years have created "a considerable body of new experience to consider regarding the consequences of requiring adherence to" an agency's *ad hoc* views, *Pearson v. Callahan*, 555 U.S. 223, 234 (2009)—and none of it bodes well, *see supra* at 6-18. So events since *Seminole Rock*'s inception only confirm why it should be abandoned.

Nor can the "reliance interests at stake," *Montejo*, 556 U.S. at 793, save *Seminole Rock*'s deference rule. That rule benefits only federal agencies. They are thus the parties naturally expected to claim an interest in preserving it. But the Court should rightfully question the federal government's attempt to preserve its ability "to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 564 U.S. at 69 (Scalia, J., concurring). Those are not the type of reliance interests sufficient to justify retaining an interpretive rule that so plainly "frustrates the

notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.*

III. This Is An Excellent Vehicle For Reconsidering *Seminole Rock*.

Members of this Court have awaited "an appropriate case," *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring), "in which the validity of *Seminole Rock* may be explored through full briefing and argument," *Mortgage Bankers*, 135 S. Ct. at 1210-11 (Alito, J., concurring in part and concurring in the judgment). This is that case.

Whether *Seminole Rock* remains valid is squarely presented here. The Federal Circuit's holding rests on *Seminole Rock* deference. Pet. App. 15a (invoking *Seminole Rock* and *Auer*); *id.* at 17a (holding "that the [Respondent's] interpretation [of the disability-benefits regulation] does not strike us as either plainly erroneous or inconsistent with the VA's regulatory framework"). And the Federal Circuit might have reached a different conclusion but for *Seminole Rock*'s requirements. *See id.* ("Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable.").

The question presented also has been "properly raised and argued." *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring). The Petition exhaustively explains why *Seminole Rock*'s continuing validity merits plenary review. The unique harms to States explained above provide additional reasons from "concurrent" sovereigns, *Tafflin*, 493 U.S. at 458, to grant certiorari and review this "important question of federal law," S. Ct. R. 10(c).

CONCLUSION

The Court should grant the petition and overrule *Seminole Rock* and *Auer*.

Respectfully submitted.

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